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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1239

UNITED BISCUIT COMPANY OF AMERICA,

Petitioner,

—v.—

W. WILLARD WIRTZ and JOSEPH CAMPBELL,

Respondents.

BRIEF ON BEHALF OF AMICUS CURIAE, NATIONAL BISCUIT COMPANY, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Pursuant to consent of all parties, National Biscuit Company submits this brief in support of the Petition for a Writ of Certiorari filed by United Biscuit Company of America.

While this case was pending, the Division of Public Contracts of the Department of Labor instituted a proceeding against National Biscuit (case No. PC-856) involving precisely the same issue as that tendered in this action. The National Biscuit proceeding was concluded on July 11, 1963. By that time the issue therein involved was already being considered by the District Court in the *United Biscuit*

case. That issue presented the question whether the sales of baked goods to commissaries at prices offered by purchase notice agreements, required the sellers to comply with the labor provisions of the Walsh-Healey Act though the individual sales contracts amounted to less than the $10,000 minimum provided by the Act.

To avoid unnecessary and duplicating litigation, National Biscuit stipulated to be bound by the ultimate holding in this case. The jurisdictional statement, the questions presented and the statute involved, as presented in United's petition for a writ of certiorari, are adopted by National Biscuit.

Statement of the Case

The facts set forth in the Petition for a Writ herein in all material respects, except one, are identical with those presented in the proceeding involving National Biscuit. The one difference is that National Biscuit, itself, received a letter dated March 18, 1943, from William R. McComb, then Deputy Administrator, Department of Labor, Division of Public Contracts, which expressly stated that

> "the so-called purchase notice agreement is not regarded as a contract but that any orders filled in accordance with the terms of the agreement are contracts."

The letter, in its entirety, is reproduced as "Appendix A".

Reasons for Granting the Writ

This Court should grant certiorari because the court below upheld the Administrator's changed position in the construction of the Purchase Notice Agreement and the applicability of the Walsh-Healey Act (41 U. S. C. §35

et seq.). Such revised construction and the determination below will have serious impact not only on the Petitioner and Amicus, but also on all persons doing business with the Government's commissaries. The change in the position of the Department of Labor, if upheld by this Court, would also have a disturbing impact on labor relations and collective bargaining agreements entered into in reliance on the Department of Labor's original interpretation.

I.

Giving no consideration to the parties' prior construction, the ruling below is erroneous.

In our view, the Administrator's original interpretation was correct. Section 35 of the Walsh-Healey Act provides that it is applicable to "any contract made and entered into by any executive department * * * or other agency * * * of the United States * * * for the manufacture or furnishing of * * * supplies * * * in any amount exceeding $10,000, * * *."

The Purchase Notice Agreement by its terms is not a "contract * * * for the * * * furnishing of * * * supplies."

Indeed, in the Purchase Notice Agreement itself, the Government was careful to specify that failure to

> "place an order under the purchase notice agreement will not be a breach of the agreement" (J. A. 14, Par. 3);

that

> "each order shall constitute a valid and binding contract for such quantities as are covered thereby" (J. A. 17, Par. 6);

and that

> "the Government is not obligated to purchase any of the items listed in this Offer." (Par. 6, J. A. 17)

In spite of the clear language of both the statute and the Purchase Notice Agreement, the court below held that the Walsh-Healey Act was intended to encompass any Government dealing which resulted in a large cumulative purchase of supplies.* It concluded, erroneously we contend, that the "Purchase Notice Agreement is a contract for the furnishing of supplies within the meaning of Section 35 of the Act." (Pet. for Cert., Appendix B, p. 42)

What the courts below overlooked was that though the Purchase Agreement is a valid and binding option contract, it is certainly not a contract to purchase and supply services or goods in an *amount in excess of $10,000*—or, for that matter, in any amount.

II.

The Act should not be expanded by judicial legislation.

The Walsh-Healey Act imposes blacklisting and other severe penalties for its violation. It goes without saying that such legislation should be reasonably explicit. But the fact is that the Government, itself, for many years

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* "Nor . . . is the fact that the Agreement is in the nature of an option contract rather than of a contract for the sale of specific goods dispositive. (Pet. for Cert., Appendix B, p. 29.)

* * * * *

"We must thus start with the presumption that Congress intended the Act to cover all regular and institutional methods of purchase used by the Government resulting in large scale acquisition of material and supplies from the private section of our economy." (Pet. for Cert., Appendix B, p. 30.)

interpreted the Act's application precisely as contended by petitioner and in this brief amicus.

National Biscuit, for its guidance in entering into labor contracts, requested an opinion from the Department of Labor. The Department responded by letter dated March 18, 1943 declaring that the Purchase Notice Agreement

> *"is not regarded as a contract [for the supplying of goods], but that any orders filled in accordance with the terms of the agreement are contracts."* (emphasis supplied) (Appendix A).

In 1950 an officer in the Department of the Army, Office of the Quartermaster General took the same position, stating

> "The Walsh-Healey Act • • • would not be considered as applying to a continuing offer" (J. A. 144)

We do not overlook the fact that this Court has only recently referred to

> "the considerable discretion possessed by the Secretary as one responsible for the actual administration of the Act"
>
> *Idaho Sheet Metal Works, Inc.* v. *Wirtz*, —— U. S. —— decided 2/24/66.

Earlier, in *U. S.* v. *American Trucking Associations*, 310 U. S. 534, 549 (1940) this Court pointed out that

> "• • • such interpretations [by the Wage and Hour Division] are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men

charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

Here, the contemporaneous construction by the government was on all fours with that of the petitioner and with the position taken in this brief, viz., that the individual contracts of purchase and sale are subject to the Walsh-Healey Act and that the continuing offer is not.

In reliance on the government's original interpretation of the Walsh-Healey Act, the baking companies supplying the government's commissaries have made agreements with labor unions which were in conformity with the Department of Labor's earlier interpretation.

The question which should be ruled upon by this court is whether the Department of Labor, having made a ruling and having interpreted a wage and hour provision in one manner, may after a lapse of time change its position, especially where, as here, the change instead of making for efficiency will create serious labor relations problems.

It is no answer to state, as did the court below, that because the interpretation was given to the National Biscuit Company, its effect should be considered only in a case involving "different parties."*

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* In a footnote to the opinion below (Pet. for Cert., Appendix B, p. 38), the Court of Appeals stated:

"Apparently, the Administrator of the Division of Public Contracts sent a letter to National Biscuit Company in 1943 stating that a Purchase Notice Agreement would not be considered a contract for the furnishing of supplies within the meaning of the Walsh-Healey Act. Appellant, however, never claimed reliance on this letter, nor was this letter introduced as an exhibit in the instant case. Thus, we will not consider what effect it might have in a similar case brought by different parties."

National Biscuit, the recipient of the letter, in its brief amicus in the Court of Appeals, informed that court that it had stipulated to be bound by the final determination in the *United Biscuit* case. Apart from that, such construction by the Wage and Hour Division undoubtedly received the attention of the various baking companies doing business with the government in connection with joint collective bargaining agreements with the Teamsters and other national unions.

In reliance on the long-standing interpretation of the Government, these agreements specify work-weeks or daily hours which are not in conformity with the requirements of the Walsh-Healey Act. To impose Walsh-Healey requirements in these complicated labor situations at this late date would cause inequities among employees covered by the same collective bargaining agreements and could contribute to industrial unrest. To interpret the statute's application differently among competitors, similarly situated, would, likewise, make for inequities. The purposes of the national labor policy, embodied in the National Labor Relations Act, would thereby be frustrated and those of the Walsh-Healey Act would not be significantly advanced.

If, after the passage of time, the applicability of a penalty-imposing statute is to be changed, that change should come from the Congress and not the agency charged with its administration, which itself changed its views as to the Act's meaning.

CONCLUSION

The Petition of United Biscuit Company of America for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

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Dated: May 13, 1966